

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LATWAHN MCELROY,  
Plaintiff,

v.

WARDEN, et al.,  
Defendants.

No. 2:21-cv-00642 JAM DB P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. Presently before the court is plaintiff's motion to recuse. (ECF No. 14.) For the reasons set forth below, this motion will be denied.

**I. Motion for Recusal**

Plaintiff's motion is entitled "Motion for correctiveness [sic] of the record; Writ of Mandate and/or order for show of cause in whether recusal of D. Barnes is requireable and timely upon the record." (ECF No. 14 at 1.) This motion requests the recusal of the undersigned. (Id.) It also argues in favor of granting plaintiff's motion to appoint counsel and request to proceed in forma pauperis ("IFP"). (Id. at 4.) The court previously denied plaintiff's motion to appoint counsel.<sup>1</sup> (ECF No. 8.) The court filed findings and recommendations that recommended

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<sup>1</sup> Plaintiff's motion to appoint counsel was denied without prejudice. (ECF No. 8.) The present motion does not appear to be a new motion to appoint counsel but instead argues the previous motion should be granted. (See ECF No. 14.) To the extent that plaintiff intended to bring a new motion to appoint counsel, plaintiff may still do so.

1 plaintiff's request for IFP status be denied. (Id.) Plaintiff already filed objections to those  
 2 findings and recommendations. (ECF No. 13.) As the motion to appoint counsel was previously  
 3 denied (ECF No. 8) and plaintiff has already filed objections to the findings and  
 4 recommendations (ECF No. 13), plaintiff's motion appears to solely be a motion to recuse and  
 5 will be considered as such.

6 Plaintiff's motion to recuse is based on the undersigned's denial of the motion for  
 7 appointment of counsel and recommendation that the IFP motion be denied. (Id.) Plaintiff states,  
 8 "the act and subjection to discrimination and disability also brings about the instant protection of  
 9 unalienable codification(s) and reasoning for recusal of Magistrate/Judges (D. Barnes) found of  
 10 misconduct and such failure to give way to remedy from those malconditions." (Id. at 3.)  
 11 Plaintiff requests recusal "due to disability, misconduct, and/or deprivation of a constitutional  
 12 guarantee that is repetitive, erroneous misstatements and cannot support the denials issued by D.  
 13 Barnes." (Id.) The alleged misconduct referenced by the plaintiff is the undersigned's denial of  
 14 the motion to appoint counsel and recommendation that the IFP motion be denied. (Id. at 2-3.)

## 15 **II. Legal Standards**

16 "Whenever a party to any proceeding in a district court makes and files a timely and  
 17 sufficient affidavit that the judge before whom the matter is pending has a personal bias or  
 18 prejudice either against him or in favor of any adverse party, such judge shall proceed no further  
 19 therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144; See also  
 20 Pesnell v. Arsenault, 543 F.3d 1038, 1043 (9th Cir. 2008), abrogated on other grounds in  
 21 Simmons v. Himmelreich, 136 S. Ct. 1843 (2016). Section 144 expressly conditions relief upon  
 22 the filing of a timely and legally sufficient affidavit. United States v. Axhocar, 581 F.2d 735, 738  
 23 (9th Cir. 1978).

24 A judge must disqualify himself if "his impartiality might be reasonably questioned," 28  
 25 U.S.C. § 455(a), or if "he has a personal bias or prejudice concerning a party, or personal  
 26 knowledge of disputed evidentiary facts concerning a party, or personal knowledge of disputed  
 27 evidentiary facts concerning the proceeding," 28 U.S.C. § 455(b)(1). However, the bias must  
 28 arise "from an extrajudicial source" and cannot be based solely on information gained in the

1 course of the proceedings. Pesnell, 543 F.3d at 1043-44 (citing Liteky v. United States, 510 U.S.  
2 540, 554-56 (1994)).

3 “[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality  
4 motion.” Id. at 1044 (quoting Liteky, 510 U.S. at 555). Judicial bias or prejudice formed during  
5 current or prior proceedings is sufficient for recusal only when the judge’s actions “display a  
6 deep-seated favoritism or antagonism that would make fair judgment impossible.” Id.; Pesnell,  
7 543 F.3d at 1044. “[E]xpressions of impatience, dissatisfaction, annoyance, and even anger’ are  
8 not grounds for establishing bias or impartiality, nor are a judge’s efforts at courtroom  
9 administration.” Pesnell, 543 F.3d at 1044 (quoting Liteky, 510 U.S. at 555-56). Further, judicial  
10 rulings alone “can only in the rarest circumstances evidence the degree of favoritism or  
11 antagonism required” for a finding of bias or partiality. Liteky, 510 U.S. at 555.

12 The objective test for determining whether recusal is required is whether a reasonable  
13 person with knowledge of all the facts would conclude that the judge’s impartiality might  
14 reasonably be questioned. United States v. Johnson, 610 F.3d 1138, 1147 (9th Cir. 2010)  
15 (quotation marks and citation omitted) (citing Clemens v. U.S. Dist. Court for the Cent. Dist. of  
16 Cal., 428 F.3d 1175, 1178 (9th Cir. 2005)). “Adverse findings do not equate to bias.” Id. at  
17 1148.

### 18 **III. Analysis**

19 Plaintiff’s present motion to recuse is substantively insufficient under § 144. Plaintiff  
20 fails to allege any facts that establish the undersigned has exhibited bias or prejudice which arose  
21 from an extrajudicial source. See U.S. v. Sibla, 624 F.2d 864, 868 (9th Cir. 1980) (“An affidavit  
22 filed pursuant to [§ 144] is not legally sufficient unless it specifically alleges facts that fairly  
23 support the contention that the judge exhibits bias or prejudice directed toward a party that stems  
24 from an extrajudicial source.”); Pesnell, 543 F.3d at 1043-44.

25 Plaintiff’s motion for recusal arises solely out of judicial actions taken by the undersigned.  
26 Plaintiff alleges that the undersigned denying his motion for appointment of counsel and  
27 recommending his motion for IFP be denied amounts to misconduct. (ECF No. 14 at 3.) Based  
28 solely on the supposed misconduct of denying and recommending that these motions be denied,

1 plaintiff asserts the undersigned should be recused. (Id.) Plaintiff's disagreement with prior  
 2 orders is not grounds for recusal. Liteky, 510 U.S. at 555. As the Supreme Court has noted,  
 3 "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Id.  
 4 When a party disagrees with a judicial ruling, appeal, not recusal, is the appropriate solution. See  
 5 Id. ("In and of themselves . . . [judicial rulings] cannot possibly show reliance upon an  
 6 extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or  
 7 antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are  
 8 proper grounds for appeal, not for recusal."); Leslie v. Grupo ICA, 198 F.3d 1152, 1160 (9th Cir.  
 9 1999) ("[Plaintiff's] allegations stem entirely from the district judge's adverse rulings. That is not  
 10 an adequate basis for recusal.") (citations omitted).

11 Given the above, plaintiff has not established bias or partiality requiring recusal of the  
 12 undersigned. Plaintiff's motion does not present any grounds for recusal that would cause a  
 13 reasonable person to conclude the impartiality of the undersigned was in question. Johnson, 610  
 14 F.3d at 1147.

15 Accordingly, plaintiff's motion to recuse (ECF No. 14) will be denied.

#### 16 **IV. Conclusion**

17 For the reasons set forth above, IT IS HEREBY ORDERED that plaintiff's motion for  
 18 recusal (ECF No. 14) is denied.

19 Dated: August 24, 2021

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 22 DEBORAH BARNES  
 23 UNITED STATES MAGISTRATE JUDGE  
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